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Supreme Court, U.S.
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No. 02-296

In The

Supreme Court of the United States

OCTOBER TERM, 2002

MILFRED J. NUNEZ
Petitioner

v.

CLARENDON AMERICA INSURANCE COMPANY
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION OF MILFRED J. NUNEZ FOR A WRIT OF CERTIORARI

Louis R. Koerner, Jr.
Koerner Law Office
1204 Jackson Avenue
New Orleans, LA 70130-5130
Phone (504)581-9569

Of Counsel:
Pete Lewis
3631 Canal Street
New Orleans, LA 70119

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PURPOSE OF THIS REPLY BRIEF

If the decision below is allowed to stand, it will be the first case in which different members of the crew of the same vessel will be treated disparately relative to their seaman status depending on the duties undertaken while admittedly in the service of a vessel engaged in the traditional maritime work of dredging.

The standards established by this Court focus on the predictability, prior to the voyage in question, by both employer and employee, of whether a particular worker is a seaman or is a land-based worker ineligible for seaman status. These would be defeated if such a determination must be made in and during each voyage and in the context of the percentage of time that a particular maritime worker and member of the crew spends, not just in the service of the vessel, but actually on board the vessel itself.

As in the case sub judice, where it has been admitted by the respondent that the injured person is a member of the crew of the Dredge Baton Rouge whose work contributed to the service of the vessel on which he served, a test, such as that established by the court of appeals that relies only on the measure of time on the vessel to the exclusion of a consideration of permanent connection to the vessel and work exclusively in the service of the vessel, departs from the settled jurisprudence of this Court and creates a conflict with the Third and Ninth Circuit Courts of Appeal.

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ARGUMENT

The crew of the Dredge Baton Rouge consisted of two leadermen, who operated the barge, the crew boat operator, the dump foreman (the title which petitioner had at the time of the accident), and the roustabout, Guillot, who assisted the dump foreman.[1] In granting summary judgment, the district court stated:

> Clarendon does not dispute that B&B's barges are vessels in navigation and that Nunez was a member of the six-man crew employed by B&B at the three locations where dredging took place.[2]

Although both Mr. Nunez and Mr. Guillot were members of the crew, who owed complete, exclusive, and singular fidelity over an extended period of time to the Dredge Baton Rouge, the Fifth Circuit found Mr. Nunez was not a seaman. Using its rational, Mr. Guillot would also not be considered a seaman. It is certainly a novel idea that one third of the members of the crew of a vessel doing the work of the vessel are not seamen.

This is contrary to the standards established by this Court that focus on the predictability, prior to the voyage in question, by both employer and employee of whether a particular worker is a seaman or is a land-based worker ineligible for seaman status.

> In evaluating the employment-related connection of a maritime worker to a vessel in navigation, courts should not employ "a 'snapshot' test for seaman status, inspecting only the situation as it exists at the instant of injury; a more enduring relationship is contemplated in the jurisprudence." *Easley, supra*, at 5. Thus, a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the

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[1] App. 32(a), opinion granting summary judgment on seaman status.

[2] App. 34(a),

worker was engaged while injured.

Chandris v. Latsis, 515 U.S. 347, 363, 115 S.Ct. 2712, 2187, 132 L. Ed. 2d 314 (1995)

The court of appeal rationalized its exclusion of crew members from seaman status as follows:

> If we were to accept Nunez's argument, we would expand the ranks of potential Jones Act seamen to all land-based employees who further the mission or function of the vessel, from salesmen to payroll clerks to corporate executives. Neither the law of the Supreme Court or of this Circuit will permit such a bizarre result. (App. 8a.)

Nunez was not just a person who furthered the mission or function of the vessel. As conceded by Respondent, Mr. Nunez was a member of the crew. He was also subject to the perils of the sea in his employment and was injured by one of them. The requirement that a maritime worker be a member of the crew eliminates all of the other land-based employees, "from salesmen to payroll clerks to corporate executives." Regrettably the "bizarre result" is denying seaman status to a member of the crew of the Dredge Baton Rouge who spendt his full time in the service of the vessel and whose work as a crew member furthered the mission of the vessel.

An injured worker has traditionally been required either to be a member of the vessel's crew "or" to spend a substantial part of his time assigned to a particular vessel or flotilla of vessels; hence, the *Barrett* opinion, which held that for non-crew members, a thirty percent rule should be, more or less, applied. However, there was an unstated implication *a contrario* that crew members need not pass the thirty percent rule, because when a vessel is truly the base of a seaman's operations, he would routinely be exposed to the perils of the sea, as was Nunez.

As stated by this Court:

The principal formulations employed by the Courts of

> Appeals--"more or less permanent assignment" or "connection to a vessel that is substantial in terms of its duration and nature"-- are simply different ways of getting at the same basic point. *Chandris*, 515 U.S. at 369-370.

This decision is the first and only holding where a permanently assigned crew member of a vessel in navigation has been held not to have a substantial connection to the vessel. Nunez's connection to the vessel was not transitory or sporadic; it was his daily base of operation and the focus of his work.

"[T]he ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." *Chandris*, 515 U.S. at 370.

Respondent's argument circumvents this notion and relies on the sole assertion that Mr. Nunez admitted in a deposition, when he was clearly confused, that. at a certain point in time, he spent only ten percent of his time aboard the vessel, not including his travel to and from the vessel nor the time he spent working the dredge lines in the River, all of which clearly related to his duties as a crew member of the dredge.

The Court will also note that the district court concluded correctly that there was sufficient evidence of seaman status for her to grant a summary judgment on that issue. This means that Nunez has never had a day in court to offer an explanation of the mischaracterized deposition testimony relied on by respondent. Further, Mr. Nunez's deposition was not the only evidence submitted. Mr. Nunez's Affidavit and that of the vessel captain, Roland Nunez, are part of the summary judgment record and further illustrate Mr. Nunez's duties and temporal connection to the vessel. They set forth in detail the various occasions wherein the plaintiff spent upwards of sixty percent of his time aboard the vessel contributing to the function of the vessel. In the absence of any rebuttal to this evidence by respondent, the District Court granted summary judgment on seaman status, thereby dispensing with a trial on this issue.

CONCLUSION

This court should overturn the untoward result of the Fifth Circuit's decision which will result in crew members of the same vessel being treated differently as a matter of law. Alternatively, Applicant requests that this matter be remanded for a trial on the merits on the factual issue of seaman status.

Petitioner therefore requests that this Court grant his Petition for Certiorari.

Respectfully submitted,

Louis R. Koerner, Jr.
Koerner Law Firm
Louisiana Bar 7817
1204 Jackson Avenue
New Orleans, Louisiana 70130-5130
Telephone: (504) 581-9569
Telecopier: (504) 566-0546
email: louis@koerner-law.com
URL: http://www.koerner-law.com

Of Counsel:

Pete Lewis
3631 Canal Street
New Orleans, LA 70119